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No. 83-2050

In The

Supreme Court of the United States

October Term, 1984

PACIFIC POWER & LIGHT COMPANY,

Petitioner,

vs.

PUBLIC SERVICE COMMISSION OF WYOMING,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WYOMING

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the judgment of the Wyoming Supreme Court based upon independent and adequate state grounds so as to require dismissal of the petition?

2. Has the Petitioner presented a substantial federal question in accordance with the prior decision of this Court?

3. Is a request to review the correctness of a state court's construction of a state statute within the limits of this Court's judicial power?

4. Has the Petitioner properly raised, preserved or presented a federal question?

5. Does the State of Wyoming have a legitimate state interest in protecting utility consumers?

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SUMMARY OF THE ARGUMENT

This Court since its founding has adhered to the principle that it will not review judgments of state courts that rest upon adequate and independent state grounds. This time honored principle is based upon the limitations of the Court's own jurisdiction. *Herb v. Pitcairn,* 324 U.S. 117, 125-126 (1945). In *Pacific Power & Light Company v. Public Service Commission, Wyo.,* 677 P.2d 799 (1984) the Wyoming Supreme Court made a plain statement that its decision rested on substantive state grounds. Respondent respectfully submits that the Court is without jurisdiction and should deny the petition for writ of certiorari.

In addition, the mere presence of a federal question will not permit review, rather the federal question must be "substantial". Even though a question as to federal law has been raised, if it appears that the question is wholly formal, or is so absolutely devoid of merit as to be frivolous, or has been explicitly foreclosed by a decision of the Supreme Court so as to leave no room for real controversy, the Court will not hear the case. Wright, *The Law of Federal Courts,* Ch. 12, section 107, pp. 743-744 (4th Ed. 1983). Here the federal question raised is insubstantial and requires denial of the petition.

STATUTES INVOLVED

The result reached by the Wyoming Public Service Commission, and affirmed by the Wyoming Court was based upon state law. The Wyoming statutes mandate:

> "In conducting any investigation pursuant to the provision of this act the commission may investigate, consider and determine such matters as the cost or value, or both, *of the property and business of any public utility, used and useful for the convenience of the public,* and all matters affecting or influencing such cost or value, . . ." (Emphasis added). WYO STAT. Section 37-2-119 (1977).

In addition, WYO STAT. Section 37-2-122(a) (1977) provides:

> "In determining what are just and reasonable rates the commission may take into consideration depreciation of plant, obsolescence of equipment, *expense of operation,* physical and other values of the plant, sys-

tem, business and properties of the public utility whose rates are under consideration." (Emphasis added).

———o———

OPINION BELOW

The judgment of the Wyoming Supreme Court is *not* based upon a procedural prerequisite as argued by Petitioner, but rather has its foundation in state substantive statutory law. The Court in *Pacific Power & Light v. Public Service Commission, supra,* affirmed the decision of the Wyoming PSC prohibiting the recovery of losses associated with abandoned nuclear power projects. The issue was whether or not the investment, expenses, and obligations incurred by the utility in these projects could be included in its rate base for Wyoming operations. *Id.* 677 P.2d at 801.

The Court clearly and expressly concluded that under the statutory language of WYO. STAT. Section 37-2-119 (1977), the nuclear power projects were not successful and were only partially constructed, and therefore they could never become "property" of a "used and useful" nature. *Id.* 677 P.2d at 805. Thus, under the statute such expenditures were not properly includable in the company's rate base.

As an alternative to the "used and useful" mandate of Wyoming law, the Petitioner argues that the abandonment costs were prudent and reasonable operating expenses properly recoverable in rates. The Wyoming Supreme Court expressly concluded that "these charges were not 'operating expenses' as that term is generally con-

sidered." *Id.* 677 P.2d at 806. State substantive law again controls the determination of whether these expenditures are recoverable in ratemaking proceedings. WYO. STAT. Section 37-2-122(a) (1977).

Petitioner mistakenly argues that the lack of prior approval from the PSC is the basis for the decision below. The Court clearly indicates that this was not the case:

> "It is recognized that the foregoing statutes and rule do not require PSC approval for PP&L's part ownership of the terminated projects. . . ."

Id. 677 P.2d at 808.

The court did *recognize* the authority of the PSC to consider such expenditures as part of the "other value of the . . . system, business . . . of the public utility" under WYO. STAT. Section 37-2-122(a) (1977), if and only if the consideration is given before the investment is made or agreed to be made. *Id.* 677 P.2d at 808. However, the Court specifically concluded that it was not necessary for the company to consult the PSC prior to the investment. *Id.* 677 P.2d at 809.

ARGUMENT I

A. The Petition For Writ Of Certiorari Should Be Dismissed As The Judgment Of The Wyoming Supreme Court Is Based Upon Independent And Adequate State Grounds.

This Court has clearly indicated that its only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights, and if the judg-

ment below rests on an independent and adequate state grounds it will not hear the case. *Zacchini v. Scripps-Howard Broadcasting Co.*, 433 U.S. 562, 566 (1977).

Thus there can be no review if the state court has decided the case exclusively on some ground of state law. Wright, *The Law of Federal Courts*, Ch. 12, section 107, p. 747 (1983). Review is precluded if state substantive law is sufficient to support the judgment no matter how the federal question is resolved. Wright and Miller, *Federal Practice and Procedure*, Ch. 10, section 4019, pp. 661-662 (1977).

If the state court decision is clearly and expressly based upon bona fide separate, adequate, and independent state grounds, the Court will not undertake to review the decision. *Michigan v. Long*, — U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).

The undeniable conclusion is that the Wyoming Supreme Court based its judgment upon the state substantive law found in WYO. STAT. Sections 37-2-119 and 37-2-122 (a). The citations above are plain statements of the Wyoming Supreme Court's decision that statutory mandates regarding used and useful property and operating expenses form the basis of its decision. This is absolutely clear from the face of the opinion.

Further, the decision of the Wyoming Court is not based upon federal law, nor interwoven with federal law. *Mine State Bank v. Bryan*, 282 U.S. 765, 773 (1931). Federal law did not compel the decision of the Wyoming Supreme Court. The majority opinion places absolutely no reliance on federal law. This Court should respect the independence of the Wyoming Supreme Court and avoid the invitation of the Appellant to render an advisory opin-

ion on state substantive law. *Michigan v. Long,* — U.S. —, 103 S.Ct. 3469, 77 L.Ed.2d 1201, 1214 (1983).

B. Decisions Of This Court Have Rendered The Petitioner's Federal Question Insubstantial.

The Court has held that even though a question of federal law has been raised, if it appears that the question has been explicitly foreclosed by a decision of the Court so as to leave no room for controversy, the Court will not hear the case. *Ut'ey v. St. Petersburg,* 292 U.S. 106, 109 (1934); Wright, *The Law of Federal Courts,* Ch. 12, sec. 107, pp. 743-744 (4th Ed. 1983). The decisions of this Court clearly indicate that Petitioner has not raised a substantial federal question regarding the recovery of abandonment costs.

Petitioner has no right, constitutional or otherwise, to have property which is not "used and useful" included in its rate base. In *Bluefield Water Works & Improvement Company v. Public Service Commission,* 262 U.S. 679, 690 (1923), this Court stated that a utility is entitled to rates which yield a reasonable return "on the value of the *property used,* at the time it is being used to render the service." The Court has held that a company is entitled to ask a fair return upon the value of that which it employs for the public convenience. *Id.* 262 U.S. at 690.

Justice Stone in his concurring opinion in *West Ohio Gas Company v. Public Utilities Commission of Ohio,* 293 U.S. 63, 78 (1935), explained, "[T]he property for which constitutional protection is invoked is that 'used and useful in the public service' not the enlarged business of the future which petitioner hopes to obtain through the present expenditure of money." Chief Justice Stone writing

for the majority in *Federal Power Commission v. Natural Gas Pipeline Company,* 315 U.S. 575 (1942), reiterated:

> "nor does the Constitution require that the losses of the business in one year shall be restored from future earnings by the device of capitalizing the losses and adding them to the rate base on which a fair return and depreciation allowance is to be earned."

Id. 315 U.S. at 590.

As a matter of federal law there is no constitutional right to a fair return on property not "used and useful" in serving the public. As a matter of state law the conclusion is the same. The "used and useful" principle of WYO. STAT. Section 37-2-119 is independent and there is no federal interest that requires a different result.

In *Denver Union Stock Yard Co. v. United States,* 304 U.S. 470, 475 (1938) the Court said:

> "As of right, safeguarded by the due process clause of the Fifth Amendment, appellant is entitled to rates, not per se excessive and extortionate, sufficient to yield a reasonable rate of return upon the value of property used, to render services. [Citations omitted]. *But it is not entitled to have included any property not used and useful for that purpose.* (Emphasis added).

Id. 304 U.S. at 475.

The decisions of this Court explicitly foreclose Petitioner's federal question and leave no room for real controversy. Petitioner should not be allowed to circumvent the clear pronouncements of this Court, by merely claiming that the same expenditures are "operating expenses."

Petitioner has no federal or state constitutional right to treat capital investments and losses in abandoned nu-

clear power projects, as if they were "operating expenses." In general, losses which are incurred in the operation of an unprofitable division or aspect of a utility's business may not be passed along to other customers as part of the cost of service. Priest, *Principles of Public Utility Regulation,* Vol. I, Ch. 3 p. 65 (1969). WYO. STAT. Section 37-2-122(a) provides that the Public Service Commission may consider the "expense of operation". However, the statute does not allow transfiguration of extraordinary loss sustained in connection with terminated nuclear power plants into ordinary operation expense. *Office of Consumers' Council v. Public Utilities Commission,* 67 Ohio St. 3d 153, 423 N.E.2d 820, 827 (1981). The Ohio Court in two subsequent cases found that the disallowance of cancelled plant costs did not constitute confiscation of private property without due process. *Cleveland Electric Illuminating Co. v. Public Utility Commission,* 4 Ohio St. 3d 107, 447 N.E.2d 746 (1983); App. dismissed for want of substantial federal question. — U.S. —, 104 S.Ct. 47, 78 L.Ed.2d 68 (1983). *Dayton Power & Light Co. v. Public Utilities Commission,* 4 Ohio St. 3d 90, 447 N.E.2d 733 (1983).

Petitioner has not presented a substantial federal question and the state law grounds are independent and adequate. The petition should be denied for lack of substantial.federal question.

ARGUMENT II

A. Petitioner's Challenge To The Correctness Of The Wyoming Supreme Court's Construction Of A State Statute Does Not Confer Jurisdiction On This Court.

The Petitioner contends that the Wyoming Supreme Court has created a procedural requirement that is unsupported by state law. The Wyoming court did construe state law to allow consideration of abandonment costs in the ratemaking formula, if presented prior to investment. However, this is NOT the basis of the Court's decision and does not create a mandatory procedural hurdle for the Petitioner. The court specifically notes that it was not necessary for the company to consult the PSC prior to the investment, and that the statutes do not require PSC approval for PP&L's part ownership in the terminated projects. *Pacific Power & Light v. PSC, supra,* 677 P.2d at 808-809. The court merely concludes that the PSC could have *considered* these expenditures if the company had sought consideration prior to the investment. Since the company had not sought such consideration, the PSC as the protector of the public interest had no authority to consider such expenditures in the ratemaking formula. Again, the court is merely interpreting the permissible scope of the PSC's review under state law, and the Petitioner is requesting this Court to render an advisory opinion upon the propriety of the Wyoming Supreme Court's interpretation of state substantive law. Even if the interpretation is erroneous, this Court does not have jurisdiction to hear the case.

It is firmly established that a merely erroneous decision given by a state court in the regular course of judicial proceedings does not deprive the unsuccessful party of property without due process of law. *American Railway Express Company v. Kentucky,* 273 U.S. 269, 273 (1927). In *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.,* 243 U.S. 157 (1917) the Court said:

> "The due process clause does not take up the laws of the several states and make all questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law."

Id. 243 U.S. at 165-166.

The courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state, and the mere fact that the state court may have rendered an erroneous decision on a question of state law does not give rise to a claim under the 14th Amendment or otherwise confer appellate jurisdiction on this court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill,* 281 U.S. 673, 680 (1930).

It is irrelevant whether this Court would construe the statute in the same way as the Wyoming Supreme Court. *Great Northern Railway Co. v. Sunburst Oil & Refining Co.,* 287 U.S. 358, 362 (1932). This Court must accept the construction given to a state statute by the highest court of the State. It is not the function of the Court to construe a state statute contrary to the construction given it by the highest court of a State. *O'Brien v. Skinner,* 414 U.S. 524, 531 (1974). Stated another way, the Supreme Court must accept the construction given to a state statute by the highest court of the State.

A request for an opinion in the nature of advice concerning legislative action is not within the limits of this Court's judicial power of deciding cases and controversies. *Muskrat v. United States,* 219 U.S. 346, 362 (1911).

Here, the Petitioner has again failed to present a substantial federal question and the petition should be

denied. Petitioner's attack upon the state court construction of the statute does not confer jurisdiction on this Court.

B. The Court Should Dismiss The Petition For Want Of A Properly Presented Federal Question.

The Petitioner argues that the interpretation of WYO. STAT. Section 37-2-122(a) allowing prior consideration of abandonment costs could not have been anticipated prior to the Wyoming Supreme Court decision. Nevertheless, Petitioner failed to raise the federal questions, now argued, at the first opportunity. Petitioner's application for rehearing fails to assert that the construction of the statute violates its constitutional rights. (See Appendix to Respondent's Brief) In effect, the first time Petitioner raises the constitutional argument is in the petition for writ of certiorari.

It is well settled that this court will not consider questions that were not properly presented for decision in the highest court of the state. *Missouri ex. rel. Missouri Ins. Co. v. Gehner,* 281 U.S. 313, 320 (1930). The federal question now argued, has never been raised, preserved, or passed upon in the state courts below. The Court has consistently refused to decide federal constitutional issues raised for the first time in the petition for writ of certiorari. *Webb v. Webb,* 451 U.S. 493, 498-499 (1981). Petitioner's federal questions were not raised prior to the petition for certiorari and the Court should not consider them. *Helvering v. Minnesota Tea Co.,* 296 U.S. 378, 380 (1935). The federal questions should have been raised in the application for rehearing to the Wyoming Supreme Court. *Brinkerhoff-Faris Trust & Savings Co. v. Hill, supra,* 281 U.S. at 680. The Court should

dismiss the petition for want of a properly presented federal question.

ARGUMENT III

The State Of Wyoming Has A Legitimate State Interest In Protecting Utility Consumers.

The regulation of public utilities has been characterized by this Court as "one of the most important functions traditionally associated with the police power of the States." *Arkansas Electric Corp. v. Arkansas Public Service Commission,* — U.S. —, 103 S.Ct. 1905, 1908, 76 L.Ed.2d 1, 6 (1983).

WYO STAT. Section 37-2-112 (1977) provides that the Wyoming Public Service Commission "shall have general and exclusive power to regulate and supervise every public utility within the state in accordance with the provisions of this act." Thus, the PSC is delegated the authority to regulate utilities in accordance with the Wyoming public utility statutes. The statutes dictate the permissible scope of the PSC's regulation. Pursuant to the statutorily mandated guidelines for ratemaking in Wyoming, the legislature has declared and the court has construed, that consumers may not be charged for investments or expenditures which are neither used and useful for Wyoming service, nor properly categorized as operating expenses.

The State of Wyoming has a legitimate state interest in providing that the public pay to a public utility no more than the services rendered to it are reasonably worth. The primary mission of the regulatory body is to pro-

tect consumers, while at the same time striving to reach a balance between consumers, producers, and those whose interests fall in between. *Public Service Commission for the State of New York v. Federal Power Commission,* 467 F.2d 361 (D.C. Cir. 1972). As a surrogate for competition, regulation does not become an insurance policy against harsh results. The hazard that property will not earn a profit remains on the company in the case of regulated, as well as unregulated business. *Federal Power Commission v. Natural Gas Pipeline Company, supra,* 315 U.S. at 590.

In *Permian Basin Area Rate Cases,* 390 U.S. 747 (1968) the Court clearly indicated:

> "Regulation may, consistently with the Constitution, limit stringently the return recovered on investment, for investors' interests provide only one of the variables on the constitutional calculus of reasonableness."

Id. 390 U.S. at 769.

It is reasonable for the State of Wyoming to limit the demands of public utilities upon the pockets of its patrons. The substance of state law has been construed by the Wyoming Supreme Court to appropriately limit PP&L's demand that losses be restored by ratepayers. Current ratepayers should bear only legitimate costs of providing service to them. This Court should respect the independence of the state court and refuse to render an advisory opinion upon state law.

———o———

CONCLUSION

For the foregoing reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE SUPREME COURT, STATE OF WYOMING

No. 83-75

PACIFIC POWER & LIGHT COMPANY,
a corporation,

Appellant
(Petitioner),

v.

THE PUBLIC SERVICE COMMISSION
OF WYOMING,

Appellee
(Respondent).

PACIFIC POWER & LIGHT COMPANY'S APPLICATION FOR REHEARING

(Filed March 5, 1984)

Pacific Power & Light Company, Appellant, respectfully requests that the Wyoming Supreme Court grant this Application for Rehearing for the following reasons and without waiving any arguments it previously presented for the Court's consideration:

1. The Court erred in finding a statutory restriction that the Commission can only consider an investment "in a potential product producing project * * * as a part of the 'other values of the system, business * * * of the public utility' * * * if the consideration, and only if the consideration is given before the investment is made or agreed to be made."

2. The Court erred in judicially establishing a restriction on the Commission's power to consider an invest-

ment in a product producing project "as a part of the 'other values of the system, business * * * of the public utility' * * * only if the consideration is given before the investment is made or agreed to be made."

3. The Court erred in finding the Commission "was not consulted prior to the investment" in the two projects at issue.

DATED: March 2, 1984.

Respectfully submitted,

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IN THE SUPREME COURT, STATE OF WYOMING

No. 83-75

PACIFIC POWER & LIGHT COMPANY,
a corporation,

Appellant
(Petitioner),

v.

THE PUBLIC SERVICE COMMISSION
OF WYOMING,

Appellee
(Respondent).

PACIFIC POWER & LIGHT COMPANY'S BRIEF IN SUPPORT OF APPLICATION FOR REHEARING

By the accompanying application, Pacific Power & Light Company ("Pacific") requests a rehearing in this matter. Such a rehearing is particularly important in this case because the primary basis for the majority's opinion was neither presented for argument nor argued by any of the parties in their briefs or in oral argument before the Court. The Court has previously stated that questions not raised or asserted at the trial level are not properly before the Supreme Court unless the question is one of jurisdiction or fundamental rights. *Valentine v. Ormsbee Exploration Corp.*, 665 P2d 452 (Wyo 1983); *U. S. Aviation, Inc. v. Wyoming Avionics, Inc.*, 664 P2d 121 (Wyo 1983); *Matter of Parental Rights of PP*, 648 P2d 512 (Wyo 1982). Similarly, the United States Supreme Court stated:

> In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may,

> of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings. *United States v. Atkinson,* 297 US 157, 56 S Ct 391 (1936).

The Court's ground for decision in this case does not fall under any of these exceptions. Thus, for example, the basis of the decision is neither an issue of the Court's jurisdiction nor an issue of protection of a fundamental right, such as in criminal cases where the defendant's liberty is at stake. The general rule should not be lightly abandoned where it promotes both the orderly processing of cases through the judicial system and procedural fairness for all litigants before the courts.

If the Court chooses to fashion another rule for review in this case, justice and equity would be well served if all parties are now given the opportunity to address the new issues raised by the Court, where, as here, the decision has such far-reaching implications for the future regulation of utilities in Wyoming. To that end, Pacific respectfully submits the following argument for the Court's consideration:

I. In Setting Just and Reasonable Rates, The Existing Statutory Scheme Allows The Commission To Consider An Investment In A Product Producing Project As A Value Of The Business Of The Public Utility Even If The Consideration Of The Investment Is Given After The Investment Is Made Or Agreed To Be Made.

As succinctly stated in Justice Rose's concurring opinion, "the PSC possesses only that power and authority granted to it by the Wyoming Constitution and statutes. The enabling statutes must be strictly construed and any

reasonable doubt as to the existence of any power must be resolved against its exercise." Concurrence at 1. Further, this Court has previously found that in determining what specific words in a statute mean, the entire enactment must be referred to in consideration of the context in which the words are used. *Saffels v. Bennett*, 630 P2d 505 (Wyo 1981).

When the entire enactment is reviewed and considered here, it is apparent that the Legislature explicitly provided procedures for specific approvals from the Public Service Commission ("Commission") where it intended to require them, as well as stated the consequences of noncompliance. The Legislature could easily have explicitly stated the prerequisite found by the majority here, but it did not do so. The conclusion is that no such prerequisite was intended.

Thus, the Legislature stated in § 37-2-205:

> No public utility shall begin construction of a line, plant or system or of any extension of a line, plant or system without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction. * * *
>
> * * *
>
> * * * The commission shall have the power, after hearing involving the financial ability and good faith of the applicant and the necessity of additional service in the community, to issue said certificate, as prayed for, or to refuse to issue the same.[1]

Similarly, the Legislature has stated that a public utility may issue stocks, stock certificates and certain

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[1]Section 37-2-205 does not apply to the projects at issue here because they were not located in Wyoming.

other securities "when authorized by order of the commission and not otherwise" and only for certain enumerated purposes, including "the construction, completion extension or improvement of its facilities." Wyo Stat § 37-6-101. The Commission must approve the issuance unless it finds "that such transactions are inconsistent with the public interest; or that the purpose or purposes thereof are not permitted by this act; or that the aggregate amount of the securities outstanding and proposed to be outstanding would exceed the fair value of the properties and business of the public utility." Wyo Stat § 37-6-102.

In spite of the Legislature's explicit requirement of prior approval in other circumstances and the absence of any such explicit requirement in the present circumstance, the majority finds that:

> if the utility wishes to involve the consumer in a loss or cost resulting from failure of [a product producing] project, i.e., if it wishes to have such cost or loss considered in subsequent rates, PSC's prior approval, is necessary. Slip Opinion at 15.

The only statutory support given by the Court for requiring such advance approval is § 37-2-122(a) which provides:

> In determining what are just and reasonable rates *the commission may take into consideration* depreciation of plant, obsolence of equipment, expense of operation, physical and *other values of the* plant, *system, business and properties* of the public utility whose rates are under consideration. (Emphasis added.)

The requirement of advance approval apparently derives from the Court's definition of the word "values." In a footnote, the majority states "PP&L's project had a book value as part of its system or business when the invest-

ment was made. After it failed, it had no value at all." Slip Opinion at 15.

The majority's finding goes beyond the interpretation of the statutory scheme created by the Legislature and creates a new procedural requirement with great substantive repercussions. Here the effective loss for noncompliance is the Wyoming allocated share of Pacific's direct investment of $182,103,000 (Ex. 7, Tables 7-1, 7-2). It is almost inconceivable that the Legislature intended such a loss to result solely as a result of a *procedural deficiency* without explicitly stating the procedural requirement. "If that was the intention of the legislature, it should have made that known in more appropriate and plainer language than that contained in our statute." *Town of Clearmont v. State H'wy Comm'n,* 357 P2d 470, 476 (Wyo 1960).

That this requirement is a creation of the majority and not of the Legislature is supported by a review of the Commission's previous actions. The Commission is charged with enforcing the provisions of Title 37 of the Wyoming Statutes. Wyo Stat § 37-2-112. Its previous actions in interpreting the provisions it is charged with administering is persuasive evidence of the intent behind the statutes. Thus, "courts have regarded administrative interpretations and applications of statutes, particularly those which govern agency operations, as persuasive, and have accorded them respect, deference, and consideration." 73A CJS Pub Admin L & Proc § 248.

At no time during the course of the present proceeding have the attorneys representing the Commission or the Commissioners themselves asserted any such require-

ment as the Court now asserts exists within the Wyoming statutory framework. Further, as was pointed out in Pacific's opening brief, the Commission has implicitly recognized these costs as legitimate costs by its allowance of recovery of Pacific's costs related to the High Mountain Sheep project. Brief of Appellant Pacific Power & Light Company at 13. No prior approval was asserted or required in that case.

In conclusion, the Legislature explicitly provided advance approval from the Commission where it intended it to be required. No such explicit requirement exists in the statutes such as the Court now finds. The existence of such a requirement has never been urged or suggested by the Commission, the agency charged with the enforcement of the statutes. The Court should find on rehearing that prior approval from the Commission is not a statutory prerequisite to any and all recovery of Pacific's investment.

II. The Legislature Is The Proper Forum For Establishing Procedural Prerequisites To Rate Recovery.

"This court has long recognized that it must not usurp or encroach upon the legislative function." *Kennedy v. State*, 559 P2d 1014, 1017 (Wyo 1977). The source of the restriction is the Wyoming Constitution, Article II § 1:

> The powers of the government of this state are divided into three distinct departments: The legislative, executive and judicial, and no person or collection of persons charged with the exercise of powers properly belonging to one of these departments shall exercise any powers properly belonging to either of the others, except as this constitution expressly directed or permitted.

Thus, this Court has repeatedly stated that "Courts will not enlarge, extend, expand or stretch a statute to matters not falling within its express provisions." *Stevens v. Rock Springs Nat'l Bank*, 577 P2d 1374, 1378 (Wyo 1978). *Bd. of Co. Comm'rs of Campbell Co. v. Ridenour*, 623 P2d 1174 (Wyo 1981); *Lo Sasso v. Braun*, 386 P2d 630 (Wyo 1963). *See also, Croxton v. Bd. of Co. Comm'rs of Natrona Co.*, 644 P2d 780 (Wyo 1982); *Ramsour v. Grange Ins. Ass'n*, 541 P2d 35 (Wyo 1975); *Snell v. Ruppert*, 541 P2d 1042 (Wyo 1975); *Parsons v. Roussalis*, 488 P2d 1050 (Wyo 1971).

> Finally, as a matter of general statutory construction, the rule is that, in construing a legislative enactment, we are bound by the language found within its four corners and we are not at liberty to insert language, words or provisions that do not there appear. *Matter of Johner*, 643 P2d 932, 934 (Wyo 1982).

Policy reasons against such judicial legislation become apparent on reviewing the procedure proposed by the majority in this case. What is left unsaid is as significant as that which is said. The point can probably best be made by comparing the Court's direction with the Legislature's direction with regard to granting certificates of public convenience and necessity.

The majority of the Court states that "Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility." Slip Opinion at 12. Succinctly put, the Court required standard seems to be one of "public interest" quite similar to the statutory requirement in § 37-2-205 that the Commission find that "the present or future public convenience and necessity require or will re-

quire such construction." With respect to the granting of certificates of public convenience and necessity, it is established that the public interest is to be given paramount consideration. *Matter of Rule Radiophone Serv., Inc.*, 621 P2d 241 (Wyo 1980); *Bull Horn Rural Elec. Co. v. Pacific Power & Light Co.*, 397 P2d 455 (Wyo 1964).

Attached as Appendix A is a recent order of the Commission granting a certificate of public convenience and necessity. It demonstrates the types of issues considered by the Commission in allowing construction to go forward, such as the applicant's financial ability to develop the project and the need for the resulting power to satisfy growing consumer load requirements. It would seem likely the same evaluations would need to be made here.[2] However, Appendix A demonstrates that no rate-making issues are addressed in the proceeding for a certificate of public convenience and necessity. Nevertheless, because of the remarkable similarity in the public interest standards in the two situations, the question is raised whether prior receipt of such a certificate from the Commission, with its necessary finding that public convenience and necessity require construction, would be sufficient to dispel the Court's concern with regard to rate recovery for investments in terminated projects.

The Court states that the Commission's consideration must be given "before the investment is made or

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[2]The remarkable similarity of context and standards to be applied between this situation and the statutory requirement for a certificate of public convenience and necessity lends support to the argument that the Legislature did not intend the expansion of the latter requirement into the former circumstances.

agreed to be made." Slip Opinion at 15. Pacific submits this would be a very difficult standard to meet and would severely limit the Commission's review of any proposed project. Clearly, the utility must make some investment in a project before approval could possibly be sought simply to have sufficient information to respond to legitimate questions on behalf of the Commission. In the case of nuclear plants, this investment can be substantial. For example, millions of dollars could be required for engineering and environmental studies before an application for approval of a major generating project could be prepared and supported before the Commission. Of necessity, the earlier the required review, the less information is available to the Commission in making its decision. The later the request for approval, the more information available to the Commission. By comparison, the statute governing certificates of public convenience and necessity simply requires approval before a utility "shall begin construction." Wyo Stat § 37-2-205. This standard allows more information to be made available to the decisionmaker than the standard now proposed by the Court. A pre-construction, instead of a pre-investment, approval standard would also allow the approval process to be less disruptive of the development of the project and, therefore, less costly to the project because review and development could occur simultaneously as long as approval preceded the actual construction phase.[3] This is particularly true because of the requirements of § 37-2-120 and the Court-envisioned ratemaking consequences of the Commission's approval. The Court states:

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[3]It should be noted that the Pebble Springs project was terminated before construction was begun.

> The requirement for prior approval of the PSC is necessary so that the risk attributable to the consumers can be evaluated and be either rejected or accepted—or, perhaps, the proportion of the risks to be borne by the consumers, if unsuccessful, can be set. The conversion computations to a used and useful property, if successful, and the period of amortization, if unsuccessful and such becomes necessary, can be predetermined. The percentage of the investment attributable to the Wyoming operation can be ascertained. Slip Opinion at 15.

Section 27-2-120 states:

> No order, however, shall be made by the commission which requires the change of any rate or service, facility or service regulation except as otherwise specifically provided, *unless or until a public hearing has been held* in accordance with the provisions of this act. (Emphasis added.)

Because of the ratemaking consequences, other parties can be expected to intervene in the required public hearing as occurs in general rate cases. If no investment can be made or agreed to be made until the approval process is complete, including any court appeals, many projects will fail simply because of the delay. Those that do not fail may be significantly more expensive. Just the inflation increase in a one or two year time span can be significant for a major project. This cost will become a necessary additional cost to every project ultimately developed, to the consumers' detriment.

Pacific believes it important for the Court to realize that these concerns are not simply academic. The Court offers a rule with respect to investments in "potential product producing project[s]." Slip Opinion at 15. Presumably, any investment Pacific might make in various alternate resource generation projects would be covered

by the Court's ruling. It is unclear whether investments in conservation programs could or would be considered "potential product producing project[s]." Finally, there is no statutory basis for distinguishing between generation projects and projects for new transmission or distribution lines.[4] Major transmission lines, which become rate base items on completion, are expensive to design, engineer and construct. They can face substantial opposition in the permitting and licensing phase. If termination results prior to operation, would recovery of previous prudent investments in the project be denied absent pre-investment approval from the Commission? Under the Court's ruling, the conservative corporate action would be to submit all of them to the Commission for advance approval, triggering a potentially protracted public hearing proceeding on issues which will become important only if the project is later terminated.

Pacific submits that not only are manifold difficulties and complexities introduced into the regulatory arena by the Court's decision, the protection of the consumer with which the Court is concerned already exists in the statutory framework. The Court expressed its concern as follows:

> If PP&L gauged the risk with the intention that the loss would be borne by the consumers, there would be no risk at all for PP&L (the stockholders). This fact might encourage PP&L to venture into activities having a very small chance of economic success with the knowledge of no loss to it should the activity fail

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[4]Indeed, the statutes governing certificates of public convenience and necessity make no such distinction, but refer to "construction of a line, plant or system, or of any extension of a line, plant or system." Wyo Stat § 37-2-205.

> and of great gain should the small chance of success occur.
>
> If the consumers are to take the risk, it would seem that they should have some say as to whether or not the projects are to be undertaken. Only PSC is properly in a position to be concerned with the consumer interest in consideration of the propriety of the risk activity and to balance the interests of the consumer and the utility. Slip Opinion at 12.

In the context of the present case, reversing the Commission as a matter of law is not tantamount to shifting the risk of terminated projects to the consumers, nor would it automatically require an increase in rates to the consumers. Rather, it would require the Commission to address the reasonableness of Pacific's actions nunc pro tunc. Thus far, the Commission has refused to address this issue:

> The utilities contend that if they were prudent they should be permitted to recover from ratepayers their investment and related financial obligations. We have indicated why we believe that application of the used and useful principle is required and appropriate. *Application of this principle makes it unnecessary to decide whether or not these utilities were prudent in their decision making, participation, and management* of these cancelled power plant projects. *Pacific Power & Light Co.*, Dkt 9454 Sub 17 (Wyo PSC Dec. 2, 1982). (Emphasis added.)

Under existing law, the Commission is not required to make any ratemaking decision affecting the consumer until the utility requests that rates actually be put into effect. At that time complete information is available to the Commission, *i.e.*, either when a plant becomes operational or when it is abandoned. Thus, where a terminated project is involved, when all the information is in, the Com-

mission is charged with reviewing the prudence of the utility's decision to construct the project, with prudence to be determined as of the time the decision to construct was made. This offers the same protection to the consumer that the Court's procedure affords. In fairness to the utility, it is not precluded from recovering investments found to have been prudently made just because it failed to seek prior Commission approval, not provided for by the governing statutes.

The confusion created by the Court's action in this case is obvious and unnecessary. Resolving these issues, should the Court let its opinion stand, will be costly and time consuming for all concerned: the Commission, the utilities, potentially the Legislature and, most important, the electric consumers and taxpayers of Wyoming. On rehearing, the existing statutory framework should supply the basis of decision.

III. If Approval Was Required, It Was Received When The Commission Approved As In the Public Interest The Financing Necessary For the Construction Program Of Which These Projects Were An Integral Part.

The Court's opinion references the Commission's allowance of amortization of Pacific's investment in the High Mountain Sheep project. It then states, "Usually the activity which subsequently failed was approved as an activity prior to its inception by the PSC or it consisted of property with a used and useful history." Slip Opinion at 15. It is unclear whether the Court believed Pacific to have received approval from the Commission for the High Mountain Sheep project, which project never

became operational. If so, the only place the Court could find such approval is in the application of §§ 37-6-101 and 37-6-102. Similar approval was received from the Commission with regard to the projects at issue here.

Section 37-6-101 requires Pacific to get advance approval from the Commission before issuing certain securities. The securities can be issued only for statutorily enumerated purposes and the Commission must find that the proceeds will be used for those purposes and that such transactions are in the public interest.

To support its ongoing construction program, Pacific came before the Commission for approval under these provisions in each and every year these projects were being developed. *Pacific Power & Light Co.*, Docket 9266 Subs 42, 43, 45, 47, 50, 53, 54, 55, 56, 57, 63, 64, 65, 70, 71, 72, 74, 75 and 78 (Wyo PSC 1973-81). A typical order from this period is attached as Appendix B. Paragraphs 8 and 9 are of particular interest. They state:

> 8. Applicant proposes to apply the net proceeds from the issuance and sale of the Common Stock for construction improvement and expansion of its electric facilities. Construction expenditures for 1977-78 are presently estimated at $602,141,000.* * *
>
> 9. The proposed issuance of the securities herein will be for lawful objects within the corporate purposes of PP&L and compatible with the public interest; the objects are necessary, appropriate and consistent with the proper performance by applicant of service as a public utility and will not impair its ability to perform that service.

If, as the Court has stated, a utility must consult the Commission with regard to generation projects under construction in order to have the investments considered in

later rate proceedings, Pacific submits that the Commission's consistent findings that Pacific's financings to construct these projects were in the public interest is sufficient approval such that the Commission must now consider these investments in the setting of just and reasonable rates.

For all of the above stated reasons, Pacific respectfully requests rehearing in this matter.

DATED: March 2, 1984.

Respectfully submitted,

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